Supreme Court, U.S.
FILED

011582 APR 24 2002

OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

SAMUEL FIRESTONE, CALVIN MIYASHIRO, JACK PUTNAM and BRIAN FRAZEN,

Petitioners,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. CANTORE *
JOSEPH L. PALLER JR.
GILBERT & SACKMAN
A Law Corporation
6100 Wilshire Boulevard
Suite 700
Los Angeles, California 90048
(323) 938-3000

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

80

85

QUESTIONS PRESENTED

1. When a state statute or regulation fixes a minimum labor standard requiring employers to pay their employees a "premium wage rate" which is greater than their "regular rate" for all work in excess of 8 hours in one day and 40 hours in one week, do the terms "premium wage rate" and "regular rate" as found in that standard require the interpretation of a collective bargaining agreement such that any claim by a union employee to enforce the standard is preempted by Section 301 of the Labor Management Relations Act?

2. If the answer to the first issue is yes, can a state statute or regulation allowing unions to "opt out" of its minimum labor standards fix as its test for whether a union has elected to opt out a procedure which requires the interpretation of a collective bargaining agreement without having the opt-out test itself be preempted under Section 301 of the Labor Management Relations Act?

3. If a claim created by state law requires the interpretation of a collective bargaining agreement, does preemption by Section 301 of the Labor Management Relations Act require that the claim be substantially extinguished?

PARTIES BELOW

The parties named in the caption herein are all of the parties in the Court of Appeals and in the District Court. Although in the captions in both courts below petitioners purported to sue on behalf of all other present and former employees similarly situated, no class was ever certified.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. Statement of the Facts	5
C. The Proceedings in the Ninth Circuit	10
D. The Companion Proceedings in the State Courts	12
REASONS FOR GRANTING THE WRIT	13
I. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THIS COURT'S DECISIONS	14
II. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THE CALIFORNIA COURT OF APPEAL	17
III. THE COURT SHOULD DECIDE THE IMPORTANT ISSUE LEFT UNRESOLVED BY *LIVADAS*	18
CONCLUSION	21

TABLE OF CONTENTS—Continued

APPENDICES

Page

Opinion of the Court of Appeals on Denial of Rehearing 1a

Opinion of the Court of Appeals 4a

Opinion and Order of the District Court 14a

Opinion of the California Court of Appeal in Related Case 32a

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ..... 47a

California Industrial Welfare Commission Order No. 4-89 ..... 49a

TABLE OF AUTHORITIES

CASES Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 19, 20
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 18, 19
Firestone v. Southern California Gas Company, 219 F.3d 1063 (9th Cir. 2000) ..... *passim*
Firestone v. Southern California Gas Company, 281 F.3d 801 (9th Cir. 2002) 1, 2, 5, 12
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 15, 16
Industrial Welfare Commission v. Superior Court, 27 Cal.3d 690 (1980) 6
International Brotherhood of Electrical Workers v. Hechler, 481 U.S. 851 (1987) 18, 19
Livadas v. Bradshaw, 512 U.S. 107 (1994) ..... *passim*
Livadas v. Bradshaw, 865 F.Supp. 642 (N.D. Cal. 1994) 21
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 18
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 15, 16
Millan v. Southern California Gas Co., 2002 Cal.App. LEXIS 2889 (2002) 12, 13, 15, 17
Morillion v. Royal Packing Company, 22 Cal.4th 575 (2000) 10
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 15
Ramirez v. Yosemite Water Company, 20 Cal.4th 785 (1999) 9
Skyline Homes, Inc. v. Department of Industrial Relations, 165 Cal.App.3d 239 (1985) 6, 9, 10
United Steelworkers of America v. Rawson, 495 U.S. 362 (1990) 19

TABLE OF AUTHORITIES—Continued

Page

Walling v. Harnischfeger Corp., 325 U.S. 427 (1945) 14
Walling v. Youngerman Reynolds Hardwood Co., 325 U.S. 419 (1945) 13, 14, 15
Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) 19

STATUTES

28 U.S.C. § 1254(1) 2
29 U.S.C. § 151 *et seq* 2
29 U.S.C. § 157 6
29 U.S.C. § 185 ..... *passim*
29 U.S.C. § 207 3
Cal. Labor Code § 227.3 13
Labor Code § 510 *et seq.* 6
Cal. Labor Code § 514 13
Cal. Labor Code § 554 13
Cal. Labor Code § 1178.5 3
Cal. Labor Code § 1182 3

REGULATIONS

Title 8, California Code of Regulations § 11040 ... *passim*
Title 8, California Code of Regulations § 11040(2)(E) 10
Title 8, California Code of Regulations § 11040(3)(A) ..... *passim*
Title 8, California Code of Regulations § 11040(3)(G) ..... *passim*

IN THE

Supreme Court of the United States

No. ___

SAMUEL FIRESTONE, CALVIN MIYASHIRO, JACK PUTNAM and BRIAN FRAZEN,

Petitioners,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Samuel Firestone, Calvin Miyashiro, Jack Putnam and Brian Frazen respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in *Samuel Firestone, Calvin Miyashiro, Jack Putnam, and Brian Frazen, individually and on behalf of all other present and former employees similarly situated, v. Southern California Gas Company*, 219 F.3d 1063 (9th Cir. 2000), as amplified by its opinion denying rehearing, 281 F.3d 801 (9th Cir. 2002).

OPINIONS BELOW

The July 14, 1998 opinion of the United States District Court for the Central District of California (the "District Court") granting defendant-respondent summary judgment is unreported, but is reproduced in the Appendix at 14a. The original opinion of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") is reported at 219 F.3d 1063 (9th Cir. 2000) and is reproduced in the Appendix at 4a. The Ninth Circuit's opinion denying rehearing is reported at 281 F.3d 801 (9th Cir. 2002) and is reproduced in the Appendix at 1a.

JURISDICTION

The Ninth Circuit rendered its original opinion affirming in part and remanding in part the final order of the District Court on July 19, 2000. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit rendered its opinion denying this petition on February 12, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the preemptive effect on state-law wage and hour claims of federal labor law, primarily Section 301 of the Labor Management Relations Act, 1947 ("Section 301"), 29 U.S.C. § 185, and the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq.* The text of Section 301 is reproduced in the Appendix at 47a.

The state-law claims at issue arose out of a California regulation, commonly referred to as "Wage Order No. 4-89," which was found at Title 8, California Code of Regulations § 11040. Relevant excerpts from the regulation, which has since been modified several times, are reproduced in the Appendix at 49a.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by a group of union employees contending that defendant-respondent Southern California Gas Company ("SCGC") violated both Section 7 of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 207 (the first claim for relief), and comparable California wage and hour law (the second claim for relief) in the manner in which it computed overtime rates on a daily basis for its meter readers.[1] Petitioners do *not* seek a writ of certiorari regarding their dismissed FLSA claims.

With respect to Petitioners' claims under California wage and hour law, California's Labor Code empowers the California Industrial Welfare Commission (the "IWC") to fix by regulation the minimum wages (*see* Cal. Labor Code § 1182) and maximum hours, as well as other minimum labor standards (*see* Cal. Labor Code § 1178.5), for California employees. At the time this case arose, the regulation applicable to Petitioners (and other similarly situated employees) was commonly referred to as Wage Order No. 4-89 and provided in part as follows:

> 3. HOURS AND DAYS OF WORK.
>
> (A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times the employee's regular rate of pay for all work over eight (8) hours in any workday or in

[1] Because of circumstances not relevant to the case, Petitioners were represented by two unions, the Utility Workers of America and the International Chemical Workers Union Council of the UFCW, AFL-CIO.

excess of forty (40) hours in any workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's *regular rate* of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's *regular rate* of pay for all hours worked in excess of twelve (12) hours in any workday, and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

* * * *

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides *premium wage rates* for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

Title 8, California Code of Regulations § 11040(3)(A) and (G) (emphasis added).

Petitioners claimed below that SCGC violated Section 3(A) of this Wage Order in the manner in which it computed their daily overtime. Although admittedly "covered by a collective bargaining agreement [which provided] a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage," Petitioners contended that the collective bargaining agreement did *not* "provide[] premium wage rates for overtime work" within the meaning of Section 3(G), so that their unions had not effectively "opted out" of the provisions of Section 3(A).

Specifically, Petitioners contended that SCGC's practice (to which Petitioners' unions had agreed) did not compensate them for all overtime hours that they worked, a practice which Petitioners contended was unlawful under California law. SCGC contended that it merely was trying to calculate Petitioners' "regular rate" by dividing a flat sum paid to Petitioners for a particular meter-reading route by the total number of hours worked, but that its computer system could not handle the resulting fluctuating rates. Accordingly, it was forced to use a formula which did reduce the number of overtime hours for which Petitioners were compensated. Petitioners responded by contending that, under California law, a fixed rate paid on a daily basis could only be divided by 8 to arrive at the employee's "regular rate."

On July 14, 1998, the District Court entered an order granting SCGC's motion for summary judgment. Appendix at 14a. The District Court concluded that the Petitioners' state-law claim regarding the manner in which SCGC calculated overtime rates on a daily basis was preempted by Section 301. On appeal, the Ninth Circuit affirmed the District Court essentially for the same reasons given by the District Court, Appendix at 4a, and later denied Petitioners' petition for rehearing and suggestion for rehearing *en banc.* Appendix at 1a. The net effect of these decisions has been to extinguish Petitioners' state-law wage and hour claim without any determination on its merits.

B. Statement of the Facts

As noted above, the State of California has delegated to the statutorily created IWC the power to fix by regulation minimum wages and other minimum working conditions, including maximum hours. Pursuant to its regulatory authority, the IWC has adopted several "Wage Orders," each applicable to a particular industry or occupation. The parties have agreed that the Wage Order that was applicable to SCGC until January 1, 1998 was Wage Order No. 4-89,

which was found in Title 8, California Code of Regulations § 11040 (hereafter, simply "Wage Order No. 4-89").[2]

Until January 1, 1998, Section 3(A) of Wage Order No. 4-89 provided that an employee could not be employed for more than forty (40) hours in one work week or more that eight (8) hours in one day unless the employee was paid at a *"premium rate"* equal to "one and one-half (1½) times such employee's *regular rate*" for all hours worked in excess of forty (40) hours in one work week and in excess of eight (8) hours in one day.[3] A primary purpose of this regulation was to actually discourage employers from working employees for more than 8 hours in one day. *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal.App.3d 239, 254 (1985); *accord Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 713 (1980) (upholding wage statement of IWC providing that overtime compensation is "a premium or penalty pay for overtime work to regulate maximum hours"). Indeed, this section went on to provide that an employee was to receive "[d]ouble the employee's regular rate" for all work in excess of twelve (12) hours in one day.

Section 3(G) of Wage Order No. 4-89 then provided that the overtime provisions of Section 3(A) automatically did not apply to any employee who had exercised his or her federally protected right under Section 7 of the NLRA, 29 U.S.C.

---

[2] Effective January 1, 1998, Wage Order No. 4-89 was amended by the IWC in Wage Order No. 4-98 which, among other things, eliminated the 8-hour day. Effective January 1, 2000, the 8-hour day was restored to California's workers, albeit now by statute. *See* Cal. Labor Code § 510 *et seq.* The current Wage Order, Wage Order No. 4-01, tracks the language of the new statute with respect to overtime.

[3] Given that the Wage Order quoted by the Ninth Circuit makes no mention of the overtime premiums required to be paid after 8 hours (7a), it appears to be Wage Order No. 4-98, which was not effective until January 1, 1998, and not Wage Order No. 4-89, the Wage Order upon which Petitioners' state-law claims were based.

§ 157, to bargain collectively and whose union had succeeded in negotiating a collective bargaining agreement that (i) provided *"premium wage rates for overtime work"* and (ii) required that the employee be paid a cash wage "not less than one dollar ($1.00) more than the minimum wage."[4] Petitioners admittedly were covered by a collective bargaining agreement that required them to be paid a cash wage "not less than one dollar ($1.00) more than the minimum wage." Nevertheless, Petitioners state-law claim essentially alleged that, even if Section 3(G) were a valid opt-out provision not itself preempted by Section 301 (as the Ninth Circuit later found), SCGC's method of paying overtime did not provide for "premium rates for overtime work" within the meaning of this section of the Wage Order, and Petitioners thus were entitled to overtime compensation in accordance with Section 3(A) of the Wage Order. Stated differently, Petitioners contended that their unions did not effectively opt out of Section 3(A) standards.

The Ninth Circuit accurately summarized the relevant facts as follows:

> In 1995, the plaintiffs' unions and the employer, Southern California Gas Company (SCGC), *agreed to a compensation arrangement set forth in a document entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes" (PPR document).* Under the Pay-Per-Route system, all meter readers were paid flat sums for completing meter reading routes of assigned lengths, even if it took less than the estimated time to complete the routes. The flat sum for each route was calculated by multiplying the hourly rate set forth in the

---

[4] Given that the citation in the Ninth Circuit's decision is to Section 3(D) and not 3(G) (Appendix at 7a), Petitioners again suspect that the Circuit was relying upon Wage Order No. 4-98 and *not* Wage Order No. 4-89.

> collective bargaining agreement ($16.56 per hour) by the amount of time it was expected to take to complete the route.
>
> Meter readers who worked more than 8 hours in one day received an adjustment to the flat sum normally paid. The method of calculating compensation for these hours is the subject of some dispute by the parties. *According to the PPR document itself*, the unassigned overtime hours posted were computed as follows: (assigned hours/actual hours) X .3334 X (actual hours—8). That figure was then multiplied by one and one-half the hourly rate set forth in the collective bargaining agreement and added to the flat rate for the assigned hours. SCGC contends that the total pay for a meter reader who worked unassigned overtime was actually calculated by dividing the flat sum by the total number of hours it actually took to complete the route to arrive at the employee's "regular rate" for that day. The meter reader would then receive one and one-half times that regular rate for hours worked beyond 8 per day, added to 8 times the "regular rate" for that day. The difference between the formula contained in the PPR document and that allegedly used by SCGC apparently resulted from the inability of SCGC's computerized payroll system to handle variable rates of pay. These formulae yield almost the same result, however, *plaintiffs contend that under either one the defendant violates state wage and hour laws by failing to provide a "premium" wage rate for overtime work.*

Appendix at 6a to 7a (emphasis added).[5]

---

[5] So that it is clear to this Court, it is undisputed that Petitioners' unions *actually agreed to* and SCGC *actually used* the formula contained in the written PPR document for purposes of computing Petitioners' overtime compensation. Excerpts of Record filed with the Ninth Circuit (hereafter, simply "ER") 116-17, 119-20, 151-52. That is, SCGC actually reduced the number of overtime hours for which an employee was compensated by using the complicated formula recited in the Court of Appeal's decision ("(assigned hours/actual hours) X .3334 X (actual

Petitioners contended "that under either one [of the formulae] the defendant violate[d the then existing] state wage and hour laws" because, under California wage and hour law, any flat sum paid to an employee (such as a flat sum per route) may only be divided by the "maximum hours" allowable under state law on a daily basis (if the flat sum is paid on daily basis) or by the "maximum hours" allowable under state law on a weekly basis (if the flat sum is paid on weekly basis) in order to determine the employee's "regular rate." *See Skyline Homes, Inc., supra*, 165 Cal.App.3d at 245 (weekly flat sum must be divided by 40—and not the actual number of hours worked—to determine an employee's "regular rate"). Thus, if SCGC's "perception" of its compensation method (*i.e.*, how it would have paid overtime compensation if its computer could have handled it) is used, it violates California law because it divides the daily flat sum by the total number of hours worked, and not by 8—the then maximum allowable daily hours.[6] Conversely, if the formula

---

hours—8)"). Admittedly, this formula ultimately resulted in the same daily pay as dividing the flat sum paid per route by the total number of hours worked to arrive at a fluctuating hourly rate of pay.

This reduced hours formula was used precisely because SCGC's computerized payroll system could not handle the "variable rates of pay" that resulted from using the other formula. "[T]he PPR [document to which the unions actually agreed] was only an accounting device to make the Pay-Per-Route system compatible with the Company's automated payroll system." SCGC's Opening Brief to the Ninth Circuit at 8-9. Petitioners readily accept the fact that SCGC intended to use the fluctuating rate formula, but could not because of its computer's limitations.

[6]Although the Ninth Circuit found this practice to have *not* violated the FLSA, "[t]he IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection [for employees] then is provided under federal law in the Fair Labor Standards Act." *Ramirez v. Yosemite Water Company*, 20 Cal.4th 785, 795 (1999). Thus, a practice which clearly does not violate the FLSA may still violate

explicitly articulated in the PPR document (*i.e.,* the actual document to which Petitioners' unions agreed and which was actually used by SCGC) is used as the test by which SCGC's compensation method is judged, it violates Wage Order No. 4-89 because it failed to compensate employees for all hours they were "engage[d], suffer[ed] or permit[ted] to work." *See* Section 2(E) of Wage Order No. 4-89.

C. The Proceedings in the Ninth Circuit

Notwithstanding the fact that the parties had agreed that the written document to which Petitioners' unions actually had agreed contained the formula actually used by SCGC's computer system to calculate overtime payments and the fact that Petitioners did not dispute that SCGC would have used the other formula if its computer system were capable of handling the fluctuating rates of pay generated whenever an employee worked more than 8 hours, the Ninth Circuit concluded that there was a dispute concerning these facts. More importantly, the Ninth Circuit concluded that the disputes arose under a collective bargaining agreement and therefore were preempted by Section 301.

Specifically, the Ninth Circuit held:

> According to plaintiffs, they are not paid a "premium rate" because the rate they ultimately receive for overtime hours is lower than the standard rate of $16.56 per hour used to calculate the flat rate for each route. Thus, argue plaintiffs, they actually receive lower wages for overtime hours than they receive for scheduled hours. On the other hand, because the employer perceives the "regular rate" to be the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day, the employer

---

California wage and hour law. *Id.* (citing cases, including *Skyline Homes, Inc., supra*); *Morillion v. Royal Packing Company*, 22 Cal.4th 575 (2000).

> maintains that plaintiffs are paid a rate for overtime work that includes a "premium" equal to 50% of the regular rate for that day.
>
> The parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law. To resolve that dispute, it would be necessary to apply California law to determine the overtime rights and obligations of the parties to the agreement. The claim is not "independent" of the collective bargaining agreement under federal premption law. *See Lingle*, 486 U.S. at 407, 108 S.Ct. 1877.

Appendix at 8a.

The Circuit then opined as follows:

> This case illustrates that problem well, for if California law were to apply, the parties negotiating the agreement would not know whether the employer's overtime obligations were defined by the contract or not, depending on which rate a court determined was the "regular" rate under the California law. The claim is preempted.

Id. at 9a.

In its decision denying rehearing, the Ninth Circuit further explained its rationale for holding Petitioners' state-law claims preempted by Section 301 as follows:

> In our original opinion in this case, we held that resolution of plaintiffs' state law overtime claim would require interpretation of the agreement, because plaintiffs are not entitled to any overtime under state law if they are paid a "premium" for overtime work above the "regular rate" of pay in the contract. *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000). The parties in this case disagree about which rate in the contract is the "regular" rate and, thus, disagree on whether plaintiffs are receiving a "premium" for overtime work. Resolving this question, we held, requires

> interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accepted.

Appendix at 2a.

D. The Companion Proceedings in the State Courts

In April 1998, while this action still was pending in the District Court, the State of California, by its Labor Commissioner, sued SCGC in state court over the exact same overtime practice with respect to the exact same class of employees (meter readers). Stated differently, California's Labor Commissioner contended that SCGC violated its statutes and regulations exactly as Petitioners claimed. Unlike Petitioners, however, California prevailed in most of its claims.

Contrary to the Ninth Circuit, the California Court of Appeal has now held (as Petitioners argued below) that the terms "regular rate" and "premium rate" are determined not be interpreting a collective bargaining agreement, but by interpreting the Wage Order. *Millan v. Southern California Gas Co.*, 2002 Cal.App. LEXIS 2889 (2002), Appendix at 45a.[7] The California appellate court also held that, when interpreting these phrases, courts should defer to the interpretation given to them by the state's Labor Commissioner. *Id.* Finally, and most importantly to this petition, the court held that the state's claims were not preempted by Section 301. *Id.* at 44a.

Petitioners concede that, given the California Court of Appeal's construction of Wage Order No. 4, there is very

---

[7] At the time this petition was sent to the printer, this case was not yet officially reported. Accordingly, as an aid to the Court, the complete opinion of the California Court of Appeal is reproduced in the Appendix at 32a.

little left of their state-law claims. *See* Appendix at 45a-46a.[8] However, as will be shown below, the Ninth Circuit's opinion is clearly erroneous, and there are many opt-out provisions in California law to which this erroneous decision may be applied. *See, e.g.*, Cal. Labor Code §§ 227.3 (allowing union to opt out of vested vacation pay), 514 (allowing unions to opt out of statutory overtime provisions), and 554 (allowing unions to opt out of seventh day of rest).

REASONS FOR GRANTING THE WRIT

There are several important reasons why a writ of certiorari to the Ninth Circuit should issue. First, the Ninth Circuit's opinion conflicts with this Court's decisions in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), and *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). Second, this Court should resolve the conflict between the Ninth Circuit and the California Court of Appeal. And third, even assuming that the Ninth Circuit's opinion is correct (and that the California Court of Appeal's decision is therefore wrong), the Court would settle an important issue of federal preemption left unresolved by *Livadas*: whether "[h]olding the plaintiff's cause of action substantively extinguished [is] always [] the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." 512 U.S. at 124 n.18.

---

[8] If their state-law claim is reinstated, Petitioners could argue that, on this issue, the California Court of Appeal erred. Specifically, Petitioners could argue that either a union's collective bargaining agreement meets the opt-out test of Section 3(G) or it does not and that, if it does not, the agreement cannot be applied to opt out of the Section 3(A) standard sometimes but not others. Petitioners have been advised that the California Labor Commissioner is seeking rehearing on this issue.

I. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THIS COURT'S DECISIONS.

The heart of the Ninth Circuit's rationale for its decision is that, because Petitioners argued that, under either formula, their "regular rate" could only be determined by dividing their flat daily rate by 8 while SCGC argued that their "regular rate" was "the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day," "[t]he parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law." Appendix at 8a. But "regular rate" is not a contractual term, it is a regulatory term plucked right out of the applicable Wage Order, *not* the collective bargaining agreement. Given this simple fact, this Court long ago recognized that:

> The regular rate . . . is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment, the determination of the regular rate becomes a matter of mathematical computation, the result of which is *unaffected by any designation of a contrary 'regular rate' in the wage contracts.*

Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424-25 (1945) (emphasis added). Thus, "[t]o discover that [regular] rate, . . . we look *not to contract nomenclature* but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945) (emphasis added).

Simply put, as this Court and the California Court of Appeal have recognized, it matters *not* whether SCGC reduced the number of overtime hours in order to calculate Petitioners' overtime compensation (as the PPR Document stated) or whether it simply divided the flat sum paid to determine an hourly rate under the collective bargaining

agreement; the determination of whether Petitioners were paid a "premium wage rate" above their "regular rate" as required by Wage Order No. 4-89(3)(G) is a simple "mathematical computation" using California wage and hour law, *not* the collective bargaining agreement. *Youngerman-Reynolds Hardwood Co., supra*, 325 U.S. at 424-25; *Millan v. Southern California Gas Co., supra*, at 44a. But even if the Ninth Circuit were right, and the determination of whether Petitioners were paid a "premium wage rate" above their "regular rate" (as required by the opt-out provisions of Section 3(G) of Wage Order No. 4-89) "requires interpretation of the agreement" (2a), what then is preempted, Petitioners' claim or the opt-out provision of Wage Order No. 4-89?

To answer this question, Petitioners first note that it is now beyond dispute that "the establishment of [minimum] labor standards falls within the traditional police power of the state," and will not lightly be held to be preempted. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). However, "'it would turn the policy that animated the [NLRA] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employees.'" *Livadas v. Bradshaw, supra*, 512 U.S. at 129 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

Thus, it is equally well established that, in fixing a minimum labor standard (such as the maximum number of hours an employee can be required to work without a premium), states may not simply "withdraw state benefits" from employees because they exercised their federal right to join a union. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Simply put, any minimum labor standard must treat "individual union and nonunion workers alike, and thus 'neither encourage[] nor discourage[] the collective-bar-

gaining processes that are the subject of the NLRA.'" *Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 20-21 (quoting *Metropolitan Life Ins. Co., supra*, 471 U.S. at 755).

Thus, in *Livadas v. Bradshaw, supra*, 512 U.S. 107, this Court held that the California Labor Commissioner's policy of refusing to process the wage claims of union workers, while processing the wage claims of non-union workers, was unlawful under federal law precisely because the California Labor Commissioner treated union workers differently than nonunion workers. It is true, as the court below obviously concluded, that this Court specifically recognized the validity of certain "familiar and narrowly drawn opt-out provisions" in state minimum labor standard statutes which allowed union workers to be treated somewhat differently by allowing their unions to bargain for a different labor standard. *Livadas*, 512 U.S. at 132. Thus, the question arises as to whether a state statute or regulation which requires the interpretation of a collective bargaining agreement could constitute such "narrowly drawn opt-out provisions" recognized as valid in *Livadas*.

Under a Maine severance statute containing an opt-out provision and discussed in *Livadas*, employers were required to provide laid-off employees with certain minimum severance benefits. However, all Maine employees (*both* union *and* nonunion alike) could expressly agree on different severance terms. *Livadas*, 512 U.S. at 130-31. Given this fact, the Court noted that, in *Fort Halifax Packing Co., supra*, it had rejected a federal attack on the Maine statute for two reasons. "Most fundamentally, the Maine law treated all employees equally, whether or not represented by a labor organization." *Id.*, 512 U.S. at 131. "Second, the minimum protections of Maine's plant closing law were relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement), but only by the parties' express agreement on different terms." *Id.*

Simply put, to be a valid opt-out provision,"union-represented employees [must] have the full protection of the minimum standard, absent any agreement for something different." *Livadas, supra*, 512 U.S. at 131. Moreover, the "agreement for something different" must be more than "the mere act of signing an employment contract"; it must be "the parties' express agreement on different terms." *Id.* Here, the Ninth Circuit held that, if a collective bargaining agreement must be interpreted to determine whether the parties actually entered into an "express agreement on different terms," Section 301 preemption requires that a union member's claim for violation of the minimum labor standard must be pre-empted without ever finding out if his or her union actually opted out of the standard. Given that any provision purporting to waive a state minimum labor standard must be "clear and unmistakable" for a court to even consider giving it effect, *Livadas*, 512 U.S. at 125, Petitioners respectfully submit that, if an opt-out provision actually requires interpretation (and thus is not clear and unmistakable), the default should be in granting "union-represented employees . . . the full protection of the minimum standard," *id.* at 131, *not* in having their claims held to be extinguished through preemption.

II. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THE CALIFORNIA COURT OF APPEAL.

Petitioners readily concede that this Court generally grants certiorari to resolve conflicts among the federal courts of appeals, not between a federal court of appeals and a state court of appeal. Here, however, the Court is presented with a unique situation.

First, although the parties to this case and to *Millan v. Southern California Gas Co., supra*, are not identical, the defendant is the same. The only difference between the two cases is that Petitioners' proposed class was never certified,

while the State of California was able to sue on behalf of all of Petitioners' coworkers without a certified class. Second, the two cases arose under the same facts, involving the same collective bargaining agreement and the same overtime provisions. And finally, the Ninth Circuit and the California Court of Appeal reached diametrically opposed conclusions.

Clearly, some Supreme Court should resolve the conflict; the only real issue is should it be the California Supreme Court or this Court. Given the important mistakes made by the Ninth Circuit on issues of federal law outlined above, Petitioners respectfully submit that it should be this Court.

III. THE COURT SHOULD DECIDE THE IMPORTANT ISSUE LEFT UNRESOLVED BY *LIVADAS*.

Before addressing this issue, Petitioners first note that there are two types of state-law claims that may be preempted by Section 301. *See Livadas*, 512 U.S. at 124 n.18. First, there is the claim that is based upon a right or duty created by a collective bargaining agreement. *See, e.g., International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (holding preempted a state-law tort action based upon a contractual duty arguably created by a collective bargaining agreement). Petitioners will refer to this type of Section 301 preemption as "*Hechler* Preemption." The second type of case that may be preempted is where the right or duty is actually created by state law, but its enforcement is "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Petitioners will refer to this second type of Section 301 preemption as "*Allis-Chalmers* Preemption."

Both forms of Section 301 preemption find their basis in Congress's intention that issues relating to the interpretation of a collective bargaining agreement be judged only in accordance with federal labor law. *Local 174, Teamsters v.*

Lucas Flour Co., 369 U.S. 95, 103-04 (1962); *see also United Steelworkers of America v. Rawson*, 495 U.S. 362, 368 (1990) ("State law is . . . 'preempted' by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation or application of collective bargaining agreements"). Given that "arbitrators are in a better position than courts *to interpret the terms of a CBA*." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 78 (1998) (emphasis in original), it is not surprising that implicit in Section 301 preemption is preserving for the labor arbitrator the interpretation of collective bargaining agreements. *Livadas*, 512 U.S. at 121-22.

With respect to *Hechler* Preemption, Petitioners, who are union members, have no problem with the concept that not only are "arbitrators in a better position than courts to interpret the terms" of their collective bargaining agreement, the parties bargained for the arbitrator's remedy of any violation of its terms, *not* that of some state court jury. *See Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 211. Thus, Petitioners have no problem with the idea that Section 301 actually extinguishes any state-law claim to enforce an obligation created by a collective bargaining agreement. *International Brotherhood of Electrical Workers v. Hechler, supra*, 481 U.S. at 860-62

With respect to *Allis-Chalmers* Preemption, however, Petitioners do have a problem with having their claims preempted, at least in the manner in which the Ninth Circuit has done so. To begin with, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court specifically recognized that a labor arbitrator has very limited jurisdiction:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. *His source of authority is the collective-bargaining agreement*, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the

various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws* that conflict with the bargain between the parties:

"An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, *the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. Ibid.* Thus *the arbitrator has authority to resolve only questions of contractual rights*, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (emphasis added).

Simply put, among other things, *Gardner-Denver* stands for the basic proposition that a labor arbitrator lacks the authority to adjudicate Petitioners' state-law overtime claims, even if a labor arbitrator is required to interpret the phases "regular rate" and "premium wage rate." But given the Ninth Circuit's decision, Petitioners also cannot bring these claims before the state court. For all intents and purposes, Petitioners' claims have been *completely extinguished* by the Ninth Circuit.

In *Livadas*, this Court recognized that: "Holding the plaintiff's cause of action substantively extinguished may not

. . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." *Livadas*, 512 U.S. at 124 n.18. This Court should grant certiorari to determine whether there are other acceptable means available, such as staying the action pending arbitration of any issue relating to the interpretation of a collective bargaining agreement. *See Livadas v. Bradshaw*, 865 F. Supp. 642, 645-46 (N.D. Cal. 1994) (on remand from Supreme Court, Labor Commissioner adopts policy of staying administrative proceedings pending arbitration of disputed terms of collective bargaining agreement). Indeed, one has to wonder whether there is any need to vindicate the arbitrator's primacy if the collective bargaining agreement is one of the rare ones which do not contain an arbitration clause.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. CANTORE *
JOSEPH L. PALLER JR.
GILBERT & SACKMAN
A Law Corporation
6100 Wilshire Boulevard
Suite 700
Los Angeles, California 90048
(323) 938-3000

* Counsel of Record

Attorneys for Petitioners